No. 42542-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CENTRAL PARK WEST, LLC,
Appellant,

v.

UNIGARD INSURANCE COMPANY,
Respondent.

BRIEF OF APPELLANT CENTRAL PARK WEST, LLC

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I. INTRODUCTION

The Appellant, Central Park West, LLC (hereinafter, "Central Park") filed suit against Unigard based upon Unigard's refusal to cover the theft of 228 chandeliers under an insurance policy issued by Unigard to Central Park. Unigard moved for summary judgment. After reviewing the evidence submitted by Unigard and Central Park, the trial court decided that it "believed" Unigard's version of events and granted summary judgment. This appeal followed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error (AOE)

1. The trial court erred in granting Unigard's motion for summary judgment.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err when it granted Unigard's motion for summary judgment when usurping the role of the jury by evaluating the credibility of the evidence, failing to view all facts in the light most favorable to Central Park, and failing to give any reasonable inferences to Central Park's evidence?

III. STATEMENT OF THE CASE

Ken Mroczek is the principal of Central Park West, LLC. CP 189. One of Mr. Mroczek's primary ways of making money is to purchase salvageable assets from estate sales. *Id.* Mr. Mroczek, being aware of the death of Al Demanovich, sought to purchase some of the salvageable assets from Mr. Demanovich's estate. *Id.*

Mr. Mroczek was a long time personal friend of Mr. Demanovich. CP 190. Mr. Demanovich shared with Mr. Mroczek that his family was not very involved with his life, and Mr. Mroczek had therefore helped Mr. Demanovich over the years with his various personal and business endeavors. *Id.* This included dozens of trips with Mr. Mroczek to Lewis County to pay utility bills, collect rents on Mr. Demonavich's properties, and to view other properties for sale and possible purchase. *Id.*

Mr. Mroczek was, in fact, the person who discovered Mr. Demanovich at his house when he became ill. *Id.* Upon not hearing an answer at Mr. Demanovich's residence, Mr. Mroczek eventually heard Mr. Demanovich asking for help. *Id.* After Mr. Demanovich's subsequent death, the ensuing probate process was fraught with difficulties, and ultimately Mr. Murr (Mr. Demanovich's nephew) agreed to sell a portion of the roughly $3 million to $4 million estate to Mr. Mroczek for $2,000. *Id.*

It is undisputed that Mr. Mroczek purchased a significant amount of salvageable personal property from the Estate of Demanovich, which he subsequently conveyed to Central Park as a capital contribution. CP 190-191. Contained within that personal property were 228 chandeliers. CP 190. At the time of the purchase, Mr. Mroczek did not know of the existence of the chandeliers and obviously was not aware of the value of the chandeliers. *Id.*

Subsequent to the purchase, the chandeliers remained in the barn located at 3381 Cent-Alpha Road, Onalaska, Washington (hereinafter the "barn") where they had been stored by Mr. Demanovich prior to his death. CP 191. The barn was very large. *Id.* It was roughly fifty or fifty-five feet in width by seventy-five to eighty feet in length. *Id.* It included a second story that was about two thirds the size of the first floor. *Id.* Mr. Demanovich was a packrat who never threw away anything, and, as a result, the barn was completely packed with boxes, old magazines, papers, and a huge variety of items. *Id.*

Most of the chandeliers were on the main level to the left and right and were covered or concealed with old papers and magazines. CP 190-191. Most cartons were approximately 20' x 30" with the exception of approximately 44 which were about 2 inches smaller in width and height. CP 191. The upper level was completely filled with boxes, and Mr.

Mroczek salvaged a large number of the boxes from that area. *Id.* Due to the packed condition of the barn, Mr. Mroczek did not discover the chandeliers until he had removed a large number of other items from the barn. *Id.*

The chandeliers were moved to various locations after their discovery. *Id.* First, the chandeliers were moved by Mr. Mroczek to a property he owned in Renton. *Id.* Mr. Mroczek had Jose Manuel Camacho Vanegas, who is listed in Defendant's list of fact witnesses, help with the moving of the chandeliers. *Id.* The Renton property was eventually condemned by Pierce County for public use. *Id.* The chandeliers were then moved to a storage unit using individuals hired by Mr. Mroczek from Labor Ready. CP 191-192. Mr. Mroczek at one time obtained the names of the individuals from Labor Ready who moved the goods and believes that those names were provided to Defendant. CP 192.

When Central Park West, LLC purchased property located at 4608 Central Park Drive, Aberdeen, Washington (hereinafter the "Aberdeen Property"), Mr. Mroczek moved the chandeliers to the Aberdeen Property. *Id.* In order to move the chandeliers, Mr. Mroczek hired laborers who were recommended by Mr. Camacho Venegas. *Id.* The chandeliers were loaded in a tractor-trailer, and the tractor-trailer was then hauled by Oak Harbor Freight Lines to the Aberdeen Property. *Id.* Mr. Mroczek

conveyed the chandeliers to Central Park West, LLC as a capital contribution. *Id.*

Central Park West, LLC intended to use the chandeliers in its plan to convert the Aberdeen Property into a museum. *Id.* The chandeliers were to be incorporated into the Aberdeen Property as part of the renovation of the building. *Id.* The museum was to have several themed areas including an old pharmacy, real estate memorabilia, art work, furnishings, vintage automobiles, Native American relics, and more. *Id.* Central Park also contemplated charging admission for special events such as fund raising auctions and shows. *Id.* In addition to display items, certain goods could be sold on consignment to provide income. *Id.* Central Park believed this could be a tremendous attraction in Aberdeen and could attract customers from a much larger area. *Id.*

The museum, however, has not been built. *Id.* Efforts have been undertaken in addition to beginning to move goods such as the chandeliers to the Aberdeen Property. *Id.* A prime example includes Mr. Mroczek discussing obtaining a loan for use in constructing the museum. *Id.*; CP 185. While the plan has not yet been completed, significant efforts have been undertaken. CP 192-193.

During 2005, the chandeliers (along with a significant quantum of additional personal property) were stolen from a building which was

insured under a policy issued by Unigard. CP 193. These items have never been recovered. *Id.* Subsequent to the burglary, Mr. Peterson of Unigard asked Mroczek to obtain information as to value so Unigard could make payment. *Id.* Mroczek visited Bogart Bremnar and Bradley in Seattle, who specialized in vintage lighting, and obtained pictures and values of similar vintage chandeliers they had for sale. *Id.* This information was then provided to Unigard. *Id.*

Unigard's Motion for Summary Judgment was argued on August 5, 2011. RP 1. After reviewing the evidence presented by Unigard and Central Park, and hearing the argument of counsel, the trial court ruled granting Unigard's motion and dismissing Central Park's claims. RP 18-19. In issuing its ruling, the trial court made clear that it found Central Park's claims to be "incredible." RP 18. The trial court went on to examine the evidence and made clear that the trial court simply did not believe Central Park's version of events. RP 17-19.

Specifically, the trial court based its evaluation of the evidence on the following statements:

1. "I find it to be incredible. You cannot pay $2,000 of chandeliers and have them worth $5,000 to $2 million." RP 18.

2. "To me, there is also a misrepresentation in -- if you look at these boxes, and I did -- I'm not a math major. But 1,200 square

feet of this barn, 9,600 cubic feet of boxes were there, along with a World War II convoy truck in this. These boxes would have been seen. 114 boxes in 1,200 square feet with a convoy truck? And I only know from looking at Fort Lewis what a convoy truck is. But surely these boxes would have been seen. There's just no doubt in the court's mind." RP 18.

3. "It goes on to talk about Jose Comacho moving this. We don't have that. What we do have is a double hearsay by that person, that allegedly he told him he had these. We don't have pictures. We don't have anything." RP 17-18.

After summarizing its evaluation of the evidence and stating that Central Park's version of events is "incredible," the court summarized its ruling as follows:

> "I think the evidence leans quite heavily to the point where I'll grant summary judgment for Unigard. I believe there was an intentional misrepresentation of material fact that they ever existed. That's the summary judgment. You have the right to appeal me, Mr. Kee. But I believe that the math, along with the depositions, along with the depositions of your client, along with the estate inventory, is sufficient. They just didn't exist."

VP 18-19.

IV. ARGUMENT

A. STANDARD OF REVIEW.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000).

B. SUMMARY JUDGMENT STANDARD

When considering summary judgment, all facts and all reasonable inferences from those facts are viewed in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "The moving party is held to a strict standard. Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party." *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990). The moving party bears the burden of

demonstrating the absence of any genuine issue of material fact. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A motion for summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 106, 33 P.3d 735 (2001).

When evaluating the evidence before the trial court, the rule is settled that "[t]he court does not weigh credibility in deciding a motion for summary judgment." *Jones v. State, Dept. of Health,* 170 Wash.2d 338, 354, 242 P.3d 825 (2010) (citing 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 25:16 (2009). On motion for summary judgment the trial court does not weigh evidence or assess witness credibility. *Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wash.App. 616, 624, 128 P.3d 633 (2006). The same is true for the court of appeals, whose "job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." *Id.*

Where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment. *Riley v. Andres*, 107 Wash.App. 391, 395, 27 P.3d 618 (2001). In such cases, "it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and

by the demeanor of the moving party while testifying." *Id.* This exception to the summary judgment rule is not limited just to the moving party herself, but to the moving party's witnesses also. *In re Estate of Black*, 116 Wash.App. 476, 487, 66 P.3d 670 (2003).

C. THE TRIAL COURT ERRED BY USURPING THE ROLE OF THE JURY AND EVALUATING THE CREDIBILITY OF PLAINTIFF'S EVIDENCE.

The trial court's decisions clearly demonstrate that the trial court usurped the role of the jury by evaluating the credibility of the evidence presented and based its decision on what it believed to be true. *See* VP 18 (stating "I believe there was an intentional misrepresentation of material fact that they ever existed. That's the summary judgment."). In evaluating a summary judgment, a court's "job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." *Id.* Here, the trial court made it abundantly clear that it was not persuaded by Central Park's evidence and that its decision was based upon its evaluation that Central Park's evidence was "incredible."

D. PLAINTIFF MET ITS BURDEN OF PRODUCTION BY INTRODUCING EVIDENCE TO DEMONSTRATE THAT THE CHANDELIERS AT ISSUE EXISTED.

Unigard's motion for summary judgment ultimately turned on a single question: did the chandeliers at issue exist? Thus, in order to

survive summary judgment, Central Park had to introduce admissible evidence that raised an issue regarding the existence of the chandeliers. The evidence must be viewed by giving all inferences and facts drawn therefrom in the light most favorable to Central Park.

Central Park introduced ample admissible evidence to raise a factual issue regarding the existence of the chandeliers. Specifically, Central Park introduced evidence, through the testimony of its principal and through the corroborating declaration of Bob Klinsmann (an uninterested bank employee), to show that the chandeliers existed and that they were going to be incorporated into the museum.

V. CONCLUSION

It is clear that Central Park has met its burden of production and introduced ample evidence to demonstrate the existence of the chandeliers at issue. The sole basis for granting summary judgment was the trial court's judgment that Central Park's evidence was "incredible" and that, accordingly, the trial court did not "believe" that the chandeliers existed. The standard of review, on a summary judgment, is not whether the court "believes" the evidence presented by the non-moving party or whether that evidence is "incredible." Rather, the standard of review requires that Central Park present evidence to create a factual issue regarding the existence of the chandeliers. It is not for the courts to evaluate that

evidence, evaluate the credibility of the witnesses or evidence, or otherwise determine what the court does or does not believe. It is the role of the jury to determine which side of the story is believed. The trial court's decision to grant summary judgment must be reversed because Central Park has met its burden of production and introduced ample admissible evidence to prove the existence of the chandeliers.

Respectfully submitted this 15th day of December, 2011.

C. SCOTT KEE, WSB#28173
Attorney for Appellant Central Park

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

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DATED at Olympia, Washington, this 15th day of Dec, 2011.

Catherine Hitchman

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